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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921 1922

No. 19 305

BALTIMORE AND OHIO RAILROAD COMPANY,
APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 15, 1922.

(28,768)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 813.

BALTIMORE AND OHIO RAILROAD COMPANY,
APPELLANT,

vs.

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APPEAL FROM THE COURT OF CLAIMS.

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1 *1. Petition and Exhibits "1" and "2".*

Filed February 9, 1921.

In the Court of Claims of the United States.

No. 39-A.

BALTIMORE AND OHIO RAILROAD COMPANY

VS.

THE UNITED STATES.

Petition.

To the Honorable the Chief Justice and Judges of the Court of Claims:

Your petitioner respectfully shows unto your honors the following facts:

1. Petitioner is a corporation organized under the laws of Maryland and operates, and at the time hereinafter stated did
2 operate, a system of railroads in Interstate Commerce. That prior to November 12, 1918, and during the month of December, 1917, your petitioner entered into an informal or implied agreement with the United States on account of negotiations between Col. Amos W. Kimball, an officer or agent acting under the authority, direction, or instruction of the Secretary of War of the United States, and W. T. Moore, of Locust Point, Maryland, an agent of your petitioner, for the conversion of the transfer shed of your petitioner adjacent to Baltimore and Ohio Railroad Company, Pier 6, at Locust Point, Baltimore, Maryland, to a barracks and the installation of necessary plumbing and certain other facilities therein for the accommodation of soldiers of the United States Army, and the building of an additional barrack building 25' 4" x 53' 6" to the east of said transfer shed equipped with plumbing and other facilities for the accommodation of officers of the said United States Army. The construction of said buildings and facilities heretofore set forth involved the abandonment of certain railroad tracks of your petitioner located at and near the aforesaid-described buildings. The buildings and facilities were constructed by your petitioner to meet the needs of the War Department of the United States at the request of Col. Amos W. Kimball, the Expeditionary Quartermaster of the said War Department at Locust Point, Baltimore, Maryland, and no written agreement was executed between the United States and your petitioner for the construction of the said buildings and facilities in the manner prescribed by law. There is due petitioner from the United States \$27,117.25 for the con-

struction of said buildings and facilities, in which amount is included the sum expended for labor and material as well as the estimated cost, less salvage, of restoring the several buildings and property to its original condition.

2. The nature, terms, and conditions of the informal or implied agreement in the matter of this claim are as follows:

Col. Amos W. Kimball, Expeditionary Quartermaster of the United States Army at Baltimore, Maryland, called upon Mr. W. T. Moore, Terminal Agent of the Baltimore and Ohio Railroad Company at Locust Point, Maryland, during December, 1917, and inquired as to the possibility of obtaining from your petitioner additional quarters at Locust Point, Maryland, for quartering soldiers of the United States and represented that such additional quarters were urgently needed for them on account of the extreme weather conditions and the unsuitable character of quarters then existing; also on account of the additional United States troops he expected would be assigned to the territory at and adjacent to Locust Point, Maryland. Mr. Moore immediately took up with the then Vice-President of the Baltimore and Ohio Railroad Company, J. M. Davis, the matter of providing suitable quarters for the aforesaid soldiers and the matter was in turn promptly referred to the then General Manager of the Baltimore and Ohio Railroad Company, R. N. Begien, for proper action. Mr. Begien immediately thereafter authorized the Chief Engineer of the Baltimore and Ohio Railroad Company to remodel and add an addition to the transfer shed for barracks purposes adjacent to Baltimore and Ohio Railroad Company, Pier 6, Locust Point, Baltimore, Maryland, and install necessary plumbing and other facilities therein and to construct an additional barrack building 25' 4" x 53' 6" to the east of said transfer shed and equip it with plumbing and other facilities, in accordance with the wishes of Col. Amos W. Kimball, Expeditionary Quartermaster of the United States Army, who desired same done by reason of the urgent necessity of the situation, due to the extreme weather conditions prevailing and to the lack of space necessary for proper housing of the United States troops stationed at Locust Point, and in addition to do such other work in connection therewith as was necessary to be done. The construction of the said buildings and facilities was authorized and carried out by your petitioner solely to meet the needs of the War Department of the United States and the same were accepted and used solely by the said War Department for the quartering of its troops. The facilities and buildings constructed by your petitioner as hereinbefore set forth are of no value to it for railroad purposes, and no part of such expenditure for said construction would have been made in the normal development of the company's property; therefore the claimant requests and demands it be reimbursed for the entire cost of the said facilities, plus the cost (less salvage) of restoring the said property to its original condition.

3. Your petitioner hereto annexes to this petition (Exhibit 1) Detailed statement showing the cost of building and facilities con-

structed and work done by your petitioner under the said informal or implied agreement as hereinbefore set forth, amounting to twenty-seven thousand one hundred and seventeen dollars and twenty-five cents (\$27,117.25): (Exhibit 2) Map showing description of buildings and facilities constructed by your petitioner at Locust Point, Maryland.

5 4. Petitioner presented its said informal or implied claim in the amount of \$44,678.98 on June 27, 1919, to the War Department under the provisions of the act of March 2, 1919, 40th Statute L., 1272. The said claim was amended on March 11, 1920, and the amount reduced to \$27,117.25. A hearing was had on it May 18 and 19, 1920, before the Claims Board, Transportation Service, War Department. The total amount of petitioner's claim passed upon by the War Department is \$27,117.25. That on June 7, 1920, the said Claims Board, Transportation Service, rendered a decision in which are certain findings of fact and the following conclusions:

"The board concludes:

Jurisdiction.—That the Claims Board, Transportation Service, has jurisdiction of this claim.

Failure of Proof.—That claimants have failed to present sufficient evidence to establish any agreement either express or implied, obligating the United States to pay to claimants, or to either of them, the amount of this claim, or any portion thereof, or any other or different sum whatever.

Recommendation.—The board recommended that this claim, and each and every item thereof, be disallowed.

CLAIMS BOARD TRANSPORTATION SERVICE."

That on June 17, 1920, your petitioner appealed to the Appeal Section, War Department Claims Board, for relief and under date of July 21, 1920, the said Appeal Section in its decision refused to grant relief or allow your petitioner's claim or any part thereof. That on August 9, 1920, your petitioner appealed from the decision of the Appeal Section, War Department Claims Board, to the Secretary of War, and under date of October 29, 1920, the Secretary of War denied the said claim in its decision as follows:

October 29, 1920

Board of Contract Adjustment.

Case No. 150-C-2832.

In the Matter of the Claim of BALTIMORE & OHIO RAILROAD.

On Appeal Before the Secretary of War.

Upon consideration of the record in this matter, the decision of the Board of Contract Adjustment is hereby affirmed in accordance with the accompanying recommendation of the special advisers.

(Signed)

NEWTON D. BAKER,

Secretary of War.

Claim of BALTIMORE & OHIO RAILROAD.

Appeal to Secretary of War from War Department Claims Board,
Appeal Section.

Memorandum.

The facts are fully set forth in the opinion, and the argument of claimant, annexed thereto.

The questions presented are similar to those arising in Pennsylvania Railroad case No. 2984.

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We recommend that the decision of the board be affirmed.
Oct. 11, 1920.

(Signed)

E. HENRY LACOMBE,

R. C. GOODALE,

Special Advisers.

5. Petitioner contends most vigorously that the aforesaid decision of the Secretary of War is erroneous and unjust, as it was not and is not obligated to provide barracks for soldiers of the United States, as that is an obligation the United States cannot deny or shirk, as the duty devolves upon it to furnish barracks or quarters for its troops. Your petitioner, in its desire to co-operate in every way with the United States during the emergency that existed at Locust Point, Maryland, at the time hereinbefore mentioned, constructed the barracks and facilities heretofore set forth and paid for them and is justly entitled to reimbursement for the full amount of the expenditure made in providing suitable quarters for the troops.

6. That no action upon your petitioner's foregoing claim has been had before Congress. That said claim was presented to the Secretary of War, and that the total amount of said claim, \$27,117.25, was disallowed by the Secretary of War, and your petitioner protested the disallowance of the said amount to the Secretary of War under date of August 9, 1920, but to no avail, and said Secretary of War

adheres to his said action of rejection. That no transfer or assignment of said claim or any part thereof or interest therein has been made. That said claim is now owned by your claimant, and no other person or corporation is the owner thereof or is interested therein, and that your petitioner is justly entitled to the amount herein claimed from the United States after allowing all just credit and set-offs; that your claimant has at all times borne true allegiance to the United States, and has not in any way voluntarily abetted or given encouragement to rebellion against said Government.

Prayer.

Wherefore your claimant prays:

1. That the court will render a judgment against the United States in favor of your claimant for payment by the United States to your claimant of the said sum of twenty-seven thousand one hundred and seventeen dollars and twenty-five cents (\$27,117.25).

2. That your claimant may have such other and further relief as the nature of the case may require and to the court may seem meet and proper.

BALTIMORE AND OHIO RAILROAD
COMPANY.

By W. D. OWENS,

Assistant Comptroller.

JOHN F. McCARRON,

Attorney of Record,

GEORGE E. HAMILTON,

Of Counsel.

9 & 10 STATE OF MARYLAND,

City of Baltimore, to wit:

W. D. Owens, being duly sworn, says he is Assistant Comptroller for the Baltimore & Ohio Railroad Company; that he has authority to subscribe to and verify the foregoing petition from said company; that he has read said petition, knows the contents thereof and the facts therein stated, and that he believes the same to be true.

GEO. W. HAULENBEEK,

Notary Public, State of Maryland.

My commission expires May 1, 1922.

STATE OF MARYLAND,

City of Baltimore, to wit:

J. J. Ekin, being first duly sworn, says he is Comptroller of the Baltimore & Ohio Railroad Company; that W. D. Owens, Assistant Comptroller, who has subscribed to and verified the petition of said company hereto, is authorized to do so.

J. J. EKIN.

Subscribed and sworn to before me this 1st day of February, A. D. 1921.

GEO. W. HAULENBEEK,
Notary Public, State of Maryland.

My commission expires May 1, 1922.

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EXHIBIT No. 1.

United States Government—War Department—to the Baltimore and Ohio Railroad Company, Dr.,

For labor and material furnished in connection with construction and maintenance of barracks adjacent to Pier No. 6, Locust Point, Baltimore, Maryland, for housing the armed guard of the U. S. Quartermaster Corps used in patroling the water-front and protecting government property in that vicinity.

Material:

Paint, No. 7, Black.....	50 gal. @	\$1.10	\$55.00
Paint, Mixed Body.....	55 gal. @	1.25	68.75
Paint, Standard Brown.....	10 gal. @	1.25	12.50
Dryer	22 gal. @	.70	15.40
Dryer, Yellow Ochre.....	5 lbs. @	.20	1.00
Oil, Raw	50 gal. @	1.14	57.00
Oil, Linseed	9 gal. @	1.14	10.26
Glass, 12" x 35".....	2 pcs. @	.30	.60
Glass, 12" x 18".....	6 pcs. @	.15	.90
Glass, Wire, 23½" x 56".....	1 pc. @	1.75	1.75
Lead, White	100 lbs. @	.0975	9.75
Turpentine	10 gal. @	.425	4.25
Iron, Galv. Sheet, No. 27.....	31 sheets @	1.40	43.40
Iron, Black Sheet, No. 24.....	9 sheets @	1.40	12.60
Nails, Timmers'	18 lbs. @	.04	.72
Nails, 10 D.....	10 kegs @	4.00	40.00
Nails, 8 D.....	5 kegs @	4.00	20.00
Tacks	40 lbs. @	.10	4.00
Rivets	1 gross @	.30	.30
Cord, No. 6, Sash.....	6 lbs. @	.045	.27
Solder	4 lbs. @	.36	1.44
Range, Steel, with boiler.....	1 @	350.00	350.00
Window Frames and Lights (lump sum)			239.00
Bunks, Romlich	25 @	6.50	162.50
Paper, Building	15,000 sq. ft.		83.25
Roofing, Composition	120 sqs.		510.45
Rim Locks, 6".....	24 @	.93	22.32
"T" Hinges & Screws.....	24 pr. @	.20	4.80

Carried Forward \$1,732.21

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Brought Forward \$1,732.21

Materials:

Pine, N. C., 1" x 12" 14'.....	280' B. M.	@ 52.50 M	14.70
Pine, N. C., 1" x 12" 16'.....	15,336' B. M.	@ 52.50 M	805.11
Pine, N. C., 1" x 8"-16'.....	5,263' B. M.	@ 45.00 M	236.84
Pine, N. C., 2" x 4"-10'.....	440' B. M.	@ 47.50 M	20.90
Pine, N. C., 2" x 4"-16'.....	6,536' B. M.	@ 47.50 M	310.46
Pine, N. C., 2" x 6"-12'.....	1,824' B. M.	@ 47.50 M	86.64
Pine, N. C., 2" x 6"-14'.....	6,608' B. M.	@ 47.50 M	313.88
Pine, N. C., 1" x 3"-10/16'...	6,180' B. M.	@ 45.00 M	278.10
Pine, N. C., 2" x 6"-16'.....	2,032' B. M.	@ 47.50 M	96.52
Pine, N. C., 3" x 6"-16'.....	1,920' B. M.	@ 47.50 M	91.20
Flooring, YP-7/8" T. & G.....	41,000' B. M.	@ 47.50 M	1,947.50
Cloth, Cheese	70 yds.	@ .07	4.90
Buckets, Fire	8	@ .66	5.28
Storeroom Labor			169.85
Hauling Material			72.55
Installing Electric Lights, Labor and Material.....			99.42
Installing Steel Range.....			5.60

Total Material \$6,291.69 \$6,291.69

Labor, Railroad Forces:

December, 1917.....	\$3,322.96
January, 1918.....	720.32
February, 1918.....	31.40
March, 1918.....	373.59
April, 1918.....	229.21
May, 1918.....	360.69
June, 1918.....	561.85
July, 1918.....	351.42
August, 1918.....	68.67
September, 1918.....	226.78
October, 1918.....	25.13
November, 1918.....	12.64
February, 1919.....	10.90

Total Railroad Labor..... \$5,474.27

Labor and Material, The A. F. Fedeli Co., Contractor... \$275.42

Total, All Labor \$13,749.39 13,749.39

Total Labor and Material..... \$20,041.08

15% Supervision 3,156.17

Total \$23,197.25

Permit from Mayor and City Council..... 10.00

Total \$23,207.25

Estimated Cost of Restoring Shed and Tracks to original condition:

Estimated Cost to Remove the Extensions.....	\$2,000.00	
Repairs—Roof, Framing, etc., at Ventilators and Eaves	500.00	
Carried Forward	\$2,500.00	\$23,207.25
13 Brought Forward	\$2,500.00	\$23,207.25
Repair—Roofing	200.00	
Replace Steps	25.00	
Boarding upon side below platform.....	100.00	
Replace Partitions in Original South End Enclosure:		
500 feet B. M. @ \$100.00 M.....	\$50.00	
2 Doors Replaced	20.00	
	70.00	
Painting, 2,000 sq. ft. @ .05.....	100.00	
	\$2,905.00	
Engineering and contingencies.....	505.00	
Total	\$3,500.00	

Salvage:

25,000' B. M. Lumber @ \$20.00.....	\$500.00	
60 Windows @ 4.00.....	240.00	
15 Doors @ 4.00.....	60.00	
2,000 l. f. Heating Pipe @ .10.....	200.00	
Plumbing Fixtures	150.00	
	1,150.00	
Total	\$2,350.00	2,350.00

Track Work:

Grading.....	330 c. y. @ \$1.00	330.00
Installing No. 7 Turnouts.....	2 @ \$85.00	170.00
Laying Track	1,000 ft. @ .40	400.00
Ballasting Track	1,000 ft. @ .40	400.00
	\$1,300.00	
Supervision 15%	200.00	
Total	\$1,500.00	1,500.00
Grand Total		\$27,117.25

Work began December, 1917.

Work completed January, 1918.

(Here follows map marked page 14.)

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II. *History of Proceedings.*

On March 2, 1921, the defendant filed a demurrer to the plaintiff's petition.

On March 21, 1921, the demurrer was argued and submitted.

On March 28, 1921, the Court entered — handed down the following order:

Order.

This case was submitted upon the defendant's demurrer to the plaintiff's petition. On consideration whereof the court, being of opinion that it should be advised as to the facts, doth hereby overrule the said demurrer without prejudice.

By THE COURT.

III. *Argument and Submission of Case.*

On February 13, 1922, this case was argued and submitted on merits by Messrs. John F. McCarron and George E. Hamilton, for plaintiff, and by Mr. Alexander H. McCormick, for defendant.

16 IV. *Findings of Fact, Conclusion of Law, and Opinion of the Court by Campbell, Ch. J.*

Entered March 6, 1922.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

The plaintiff, the Baltimore & Ohio Railroad Company, is, and was during the transactions hereinafter described, a corporation duly incorporated under the laws of the State of Maryland, and was the owner of a system of railroads engaged in interstate commerce.

II.

About September 1, 1917, Lieut. Col. Amos W. Kimball, was ordered for duty at Baltimore, Md., to establish an expeditionary depot and to take charge of all supplies arriving at that place for transportation to New York and other ports for shipment to Europe. In working out his plans he visited Canton, a suburb of Baltimore, on the Chesapeake Bay, and succeeded in securing from the Canton Railroad Company an option on the largest pier at that place, known as Pier No. 3. He afterwards visited Mr. Willard, the president of

the Baltimore & Ohio Railroad Company, who promised to lease to the Government Pier No. 6, which was then under construction for \$150,000 a year. The deal was closed about September 15, 1917, but the lease was not executed until October, 1917, after which the pier was rushed to completion. Pier No. 6 was located at Locust Point, another suburb of Baltimore on the Chesapeake Bay, across the river from Canton. The Baltimore & Ohio Railroad Company owned eight piers at Locust Point, numbered from 1 to 9, No. 7 never having been constructed. These piers and the property on and around them were guarded at that time by civilian employees of the railroad companies.

III.

On October 30, 1917, Pier No. 9 was destroyed and Pier No. 8
17 damaged, and much other property belonging to the Baltimore & Ohio Railroad Company was destroyed by a fire supposed to be of incendiary origin. Pier No. 9 was afterwards rebuilt and completed and Pier No. 8 was repaired early in January, 1918, and both piers were leased by the Government prior to January 10, 1918.

On October 31, 1917, Col. Kimball reported the occurrence to Washington officially by telephone, and requested that a guard be sent to Locust Point immediately. Shortly afterwards, on the same day, he visited Mr. Thompson, the acting president of the Baltimore & Ohio Railroad Company, and told him of his request for a military guard and learned that Mr. Willard, the president of the company, who was at that time head of the Committee on National Defense, had already requested the Secretary of War to furnish a guard. Mr. Thompson offered to supply a wrecking train, with a kitchen, plenty of bunks for the men, and a car for the officers, as quarters for the guard.

IV.

On the night of November 3, 1917, Maj. Charles L. Lanham, of the Coast Artillery Corps, stationed at Fort Howard, and commanding the coast defense of Baltimore, received a telephone message from the commander of the Eastern Department to send at once two companies of Coast Artillery of the Maryland National Guard, which had been mustered into the United States service and was then at Fort Howard, to Baltimore, one company to Locust Point and one to Canton, and to get in touch with Col. Amos W. Kimball, quartermaster of the expeditionary depot at Baltimore, who would advise as to the details of their duties. The order was for the troops to have sufficient tentage, and it was carried. He was informed by Col. Kimball that officials of the Baltimore & Ohio Railroad Company had arranged to quarter the guard on a construction train at Locust Point. One of the companies was dispatched about midnight of the same day to Locust Point. The next day Maj. Carrol Edgar, Coast Artillery Corps, who was in command of the First Battalion of Coast Artillery of the Maryland

National Guard, was directed by Maj. Lanham to proceed with the other company to Locust Point to take command of the detachment and to advise with Col. Kimball as to the proper distribution of the troops for guarding the piers at Locust Point and Canton.

V.

The troops were quartered in the wrecking train that had been placed in Baltimore & Ohio Railroad yard at Locust Point on November 3, 1917. After a conference with Col. Kimball and Maj. Brady, executive officer of the expeditionary depot, Maj. Edgar arranged the guard, reduced by sickness and absence to 150 men, so that a part would guard the pier at Canton and a part the piers and property at Locust Point. The troops were quartered at Locust Point and the guard for Canton was sent over the river daily. The primary duty of the troops was to protect Government property and the piers leased by the Government, but generally to guard the whole water front, especially Pier No. 6, and to send patrols at various times throughout the railroad yard at Locust Point to guard cars containing property that might be used by the Government, and generally to guard all the piers and all the property at that place. The company also maintained civilian guards for its own property and a fire department for all of its property, whether leased or not.

VI.

The detachment was quartered on the wrecking train until November 9, 1917, when use of the train became necessary for some railroad purpose and it was moved away by the company. The troops then moved into tents.

The weather during the fall and winter of 1917-18 was very cold and inclement. The soldiers of the guard were for the most part Baltimoreans and their parents and other relatives visited them frequently. There was some sickness among the troops. Their relatives complained to the railroad officials of the hardships the soldiers had to undergo living in tents during such cold weather. The railroad officials were anxious to make them as comfortable as possible.

There was a transfer shed and platform at Locust Point near Pier No. 6 on land belonging to the company and not leased to the Government, built by the Baltimore & Ohio Railroad Company about 30 years before, but which had not been used for several years. It was in sound condition, however. The agent of the company in charge at Locust Point was Mr. William T. Moore, who was also a member of an advisory committee, his duty being to confer with Col. Kimball on railroad matters, and Mr. Moore and Col. Kimball met often in conference on such subjects. On a number of occasions when the weather was very cold, Col. Kimball had remarked that the troops ought to have better quarters. Mr. Moore suggested fitting up the old unused transfer shed near Pier No. 6, and Col. Kimball agreed that it would be a fine thing to make the men as comfortable as pos-

sible. Nothing was said about compensation. Col. Kimball did not ask that this work be done.

Mr. Moore afterwards saw the vice president of the company, Mr. Davis, about fitting up the transfer shed for quarters, who referred him to Mr. Begien, the general manager of the Baltimore & Ohio eastern lines. He saw Mr. Begien about the matter, who, after a short talk with the chief engineer, directed Mr. Riley, the chief draftsman in the chief engineer's office, to accompany Mr. Moore to Locust Point to look over the adaptability of the transfer shed for barracks. They visited the place together, and the next day Mr. Riley visited the shed again and took some measurements, made some pencil sketches, and afterwards got up blue-print plans for remodeling the shed for barracks. The plans provided for inclosing the north end and the east side of the shed and placing an extension on the west side with a lean-to roof, which more than doubled the capacity of the original shed, and a room for the officers to be built on the south end of the shed and extension.

The building was partitioned off into a mess hall, kitchen, guard room, sleeping room with bunks for the men, and officers' room, and suitable windows and doors were placed. The building was fitted with lights, steam heat, and water, seven toilets, nine basins, four shower baths, and a wash trough.

19 The blue print of the plans for changing the transfer shed into temporary barracks was shown to Maj. Edgar to learn from him whether or not the plans, in his opinion, would satisfactorily house the troops. He did not undertake to approve the plans, but did, however, suggest to Mr. Riley, who brought the plans to him, the amount of the facilities that would be required. This was about December 1, 1917. Nothing was said to Maj. Edgar about expense or compensation for the work.

VII.

The construction of barracks out of the old transfer shed began in the early part of December, 1917, and was completed on or about December 22, 1917, on which date the first company of the guard moved in, and on December 26, 1917, the second company moved in. The troops occupied this building until May, 1919. The piers were returned to the company in June, 1919.

No Government officials connected with the work at Locust Point in 1917 had any authority to order the construction of the temporary barracks in question, and no orders were given by them, or any of them, for the construction of such building. The subject of compensation was not mentioned in any conversations between Army officers and railroad officials until over a week after the building had been completed, when Mr. Moore told Maj. Edgar that he thought the Government ought to reimburse him for some of his trouble in the matter.

VIII.

On January 10, 1918, Col. Kimball addressed a request to the Quartermaster General for four additional companies of 105 men each to protect the vast amount of Government property stored on the piers and in the warehouses at Locust Point and Canton and en route to that port, and for immediate authority to construct two barrack buildings with proper facilities to accommodate three companies of 105 men each, one at Locust Point and one at Canton, of the type recently constructed at the various cantonments.

On February 4, 1918, the first indorsement on said request by the Acting Quartermaster General, addressed to The Adjutant General, requested authority for the construction of said barracks if the additional guard should be furnished.

On February 8, 1918, the third indorsement on said request was made by The Adjutant General advising that the request for guards should be made to the commanding general of the Eastern Department, and stating that "It is not the policy of the War Department to build a set of barracks for each and every guard. Companies will be quartered in tents where buildings are not available."

IX.

After the barracks made from the old transfer shed were evacuated by the two companies of Coast Artillery, the bunks, toilets, and plumbing were removed, and later part of the building was used by the Dominick, Scandinavian, and Oriole lines of steamships for different purposes, and the collector of internal revenue was also allowed to establish a branch office in the building, without paying rent. The building is still standing and partly occupied.

The Canton Railroad Company at a cost of about \$5,000 provided comfortable accommodations for the guard sent over daily from Locust Point to protect Government and railroad property at Canton and has present no claim therefor.

X.

The plaintiff, on June 27, 1919, presented its first claim for construction of the temporary barracks at Locust Point to the War Department, under the provisions of the act of March 2, 1919, 40 Stat., 1272, commonly known as the "Dent Act," for \$44,678.98. It was amended on March 11, 1920, by reducing the amount claimed to \$27,117.25.

The heading of the account rendered reads: "United States Government—War Department to The Baltimore and Ohio Railroad—Federal Administration, Drs. (as their interests may appear), for labor and material furnished in connection with construction and maintenance of barracks adjacent to Pier No. 6, Locust Point, Baltimore, Maryland, for housing the armed guard of the U. S. Quarter-

master Corps, used in patrolling the water front and protecting Government property in that vicinity."

Part of the heading of the account quoted above has been omitted from the account attached to plaintiff's petition as Exhibit No. 1; the balance of the account is the same as that presented to the board, and is made part of this finding by reference thereto.

The plaintiff has submitted no evidence to the court to establish the different items of the claim for constructing or restoring the temporary barracks.

On June 7, 1920, the War Department Claims Board, Transportation Service, rendered its decision, which consisted of findings of fact and the following conclusion:

"Jurisdiction.—That the Claims Board, Transportation Service, has jurisdiction of this claim.

"Failure of proof.—That claimants have failed to present sufficient evidence to establish any agreement, either express or implied, obligating the United States to pay to claimants, or to either of them, the amount of this claim, or any portion thereof, or any other or different sum whatever.

"Recommendation.—The board recommends that this claim, and each and every item thereof, be disallowed."

On June 17, 1920, the plaintiff appealed to the appeal section of the War Department Claims Board, which, on July 21, 1920, affirmed the decision of the Claims Board.

On August 9, 1920, the plaintiff appealed to the Secretary of War, who, on October 29, 1920, rendered the following decision:

"Upon consideration of the record in the matter, the decision of the Board of Contract Adjustment is hereby affirmed in accordance with the accompanying recommendation of the special advisers."

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Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this cause, the amount thereof to be entered by the clerk and collected by him according to law.

Opinion.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The plaintiff, Baltimore & Ohio Railroad Company, sues for a large sum alleged to have been laid out and expended in the construction of barracks for United States troops at Locust Point, Md.

The claim was first presented to the War Department Claims Board under what is known as the Dent Act (40 Stat., 1272) in the names of two parties, "as their interests may appear," but it comes to this

court upon the petition of the railroad company alone. The board held that no contract, express or implied, was shown by the proof; this ruling was sustained by the appeal section of the board, and upon appeal taken to the Secretary of War the decision was affirmed. The only evidence adduced is that which was before the board, it having been brought into this record by stipulation of the parties.

The Dent Act empowered the Secretary of War to "adjust, pay, or discharge any agreement, express or implied, * * * entered into in good faith, * * * by any officer or agent, acting under his authority, direction, or instruction, or that of the President, with any person * * * for equipment or supplies or for service or for facilities, or other purposes connected with the prosecution of the war when such agreement has been performed, in whole or in part, or expenditures have been made * * * upon faith of the same by any such persons * * *, and such agreement has not been executed in the manner prescribed by law." The act contains several provisos not material here. By its terms it deals with agreements, express or implied, which so far as affects the Government shall have been entered into by a duly authorized officer or agent, and referring to agreements, express or implied, "entered into in good faith," between authorized persons, there should appear the essential element of "a meeting of the minds." *Lord & Hewlett Case*, 217 U. S. 340 (43 C. Cls. 282). It is, of course, necessary that the claim itself be established by proof. The plaintiff does not claim under an express contract, but alleged that an implied agreement arose out of certain negotiations in December, 1917, between its own agent, Mr. Moore, and Col. Kimball, who is alleged to have been "an officer or agent acting under the authority, direction, or instruction of the Secretary of War" for the conversion of a transfer shed belonging to plaintiff into barracks and equipping the same for the accommodation of troops of the United States, and the building of an additional structure for the accommodation of officers. The amount claimed is \$27,117.25.

22 The railroad company had leased a pier to the Government at Locust Point for \$150,000 per annum, and owned a number of piers there in addition, some six or eight. Vast stores were assembled in and about these piers. On the night of October 30, 1917, a fire, supposed to have been of incendiary origin, destroyed one of the company's piers and greatly damaged another. Lieut. Col. Kimball, Quartermaster Corps, in charge of expeditionary depot at Baltimore, communicated the fact the next morning to the War Department and requested that troops be dispatched immediately to guard the Government's property at Locust Point. He told the acting president of the company of this request, and learned from him that Mr. Willard, president of the company, who was head of the Committee of National Defense, had made a similar request of the Secretary of War. Mr. Thompson, in that conversation, offered the use of a train in the yards at Locust Point which he said was suitable for housing the troops. Two companies of troops from Camp Howard were ordered to Locust Point. They were part of the Maryland National Guard that had been mustered into service and were com-

posed largely, if not entirely, of men whose local residences were at Baltimore. The order directed that tentage be carried with the troops, and it was carried. When the companies arrived at Locust Point, one on November 3 and the other November 4, they were quartered in the cars of the wrecking train of which Mr. Thompson had spoken to Col. Kimball, and remained there until November 9, when the train was moved away and the troops went into the tents. These troops were intended to guard property at Locust Point as well as at Canton across the river, and they protected the property of the Government and the railroad company as well. The weather was very cold and severe during the winter of 1917. Some of the soldiers became sick, their relatives and friends complained repeatedly to officials of the company of the hardships the troops had to undergo in tents, and the want of accommodations. The troops had been in tents several weeks before the alleged negotiations between Mr. Moore and Col. Kimball, and it was during the period of the complaints above mentioned that the agreement is alleged to have been made. Mr. Moore suggested that a transfer shed belonging to the company could be converted into barracks. Col. Kimball approved the suggestion, but Mr. Moore was not authorized by the company to make the necessary alterations, nor was Col. Kimball authorized to incur the expense on the part of the Government. Mr. Moore took up the matter with his superiors, and they issued the necessary orders to convert the shed into living quarters and it was done. The shed was on the company's land and its property. At no time was there a statement or suggestion that the expense of the structure was to be charged against the Government. What the cost would be was not submitted to Col. Kimball. He positively denies that he incurred or authorized the expense. He was not authorized, instructed, or directed by the Secretary of War to construct temporary barracks. The War Department was not communicated with on the subject. The statutes have regulated the expenditures for permanent barracks and buildings. See Rev. Stat., sec. 1136; act February 27, 1877, 19 Stat., 242; act February 27, 1893, 27 Stat., 484; act June 25, 1910, 36 Stat., 721. The Army appropriation act of May 12, 1917, 40 Stat., 74, contains a provision that "hereafter no expenditure exceeding \$5,000 shall be made upon any building or military post or grounds, about the same, without the approval of the Secretary of War, upon detailed estimates submitted to him." And if it may be said that these statutes do not in terms affect a structure such as that in question here, they at least indicate the policy that authority for expenditures shall be vested in a responsible head, who, generally speaking, is the Secretary of War. Assuming, however, there may be cases of exigency when an officer, to properly care for the troops under his command, may incur unusual, or at the time unauthorized expenses, that can not be the case where there is plenty of time before incurring the expense to ask for and to receive the necessary authority. At all times of the day communication between Baltimore and Washington was open; the troops remained in tents from November 9 to December 22; the president of the rail-

road company was at the head of one of the most important war boards, and could readily have conferred with the War Department.

In these circumstances there was no reason why authority to incur the unusual expenditure should not have been sought at Washington; there was no present exigency justifying the building of barracks without first definitely ascertaining the question of liability or seeking instructions with regard to it. The limited authority of an officer is a matter that all persons dealing with him must take notice of, and there is nothing in the occurrences that took place in this case that relieved the plaintiff from the duty to act advisedly in making outlays if it expected the Government to make reimbursement therefor. The evidence falls short of showing an agreement that would bind the Government to pay for altering or improving and adding to a structure on the company's land that remained the company's property after the alterations were made, and yet remains its property, even though it was used for a period to house United States troops. The duties of these troops involved in part the guarding of the company's valuable properties.

The foregoing considerations are sufficient to dispose of the case, but there is an implication in plaintiff's brief that tends to an erroneous conclusion on the question of proof. The implication is that because the Government does not "disapprove" the claim the plaintiff is entitled to judgment. It would seem from the record before the Claims Board that the matter of proof as to the amount, or items of the claim itself, was passed over pending a determination of legal liability. The general traverse puts in issue all material elements in a plaintiff's case in this court, and such a practice as that suggested before the board does not obtain here.

The petition should be dismissed, and it is so ordered.

Graham, judge; Hay, judge; Downey, judge; and Booth, judge, concur.

24 *V. Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Sixth day of March, A. D., 1922, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendant, and do order, adjudge and decree that the plaintiff, as aforesaid, is not entitled to recover and shall not have and recover any sum in this action of and from the United States; and that the petition herein be and the same hereby is dismissed; and it is further ordered, adjudged and decreed that the United States shall have and recover of and from the plaintiff, as aforesaid, the sum of One Hundred and fifty-four dollars and seventy-nine cents (\$154.79), the cost of printing the record in this court, to be collected by the Clerk, as provided by law.

By THE COURT.

VI. *Plaintiff's Application for and Allowance of an Appeal.*

Now comes the Baltimore & Ohio Railroad Company by its attorneys, George E. Hamilton, of Counsel and John F. McCarron, Attorney of Record, and appeals to the Supreme Court of the United States from the decision of this honorable court rendered in this cause in favor of the United States on March 6, 1922.

Very respectfully,

GEORGE E. HAMILTON,
Of Counsel.
JOHN F. McCARRON,
Attorney of Record.

Filed Meh. 13, 1922.

Ordered: That the above appeal be allowed as prayed for,
March 13, 1922.

By THE COURT.

25

Court of Claims.

No. 39-A.

BALTIMORE AND OHIO RAILROAD COMPANY

VS.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and opinion of the Court by Campbell, Ch. J.; of the judgment of the court; of the plaintiff's application for and the allowance of an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this Fourteenth day of March, A. D., 1922.

[Seal of the Court of Claims.]

F. C. KLEINSCHMIDT,
Assistant Clerk Court of Claims.

Endorsed on cover: File No. 28,768. Court of Claims. Term No. 813. Baltimore and Ohio Railroad Company, appellant, vs. The United States. Filed March 15th, 1922. File No. 28,768.